Tenaga Nasional Bhd v MTD Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S7–22–588 OF 2008
ROSILAH YOP JC
24 JULY 2012

Tort — Negligence — Duty of care — Breach of — Economic loss — Claims for — Damage to plaintiff's underground electric cables — Plaintiff suffered damage and severe losses — Whether work carried out according to representations made by plaintiff's representative — Whether damage suffered by plaintiff reasonably foreseeable — Whether defendant breached its duty of care to plaintiff

The plaintiff's claim against the defendant was for damages and losses caused by the defendant's breach of duty for the tort of negligence. The defendant was the contractor appointed by Dewan Bandaraya Kuala Lumpur ('DBKL') to carry out construction works, inter alia, at PPU Plaza Phoenix adjacent to a petrol service station ('the said location'). During the said construction, the defendant had damaged the underground 33kv electric cables owned by the plaintiff. As a result of the damage, it had caused the supply disruption around Cheras. The plaintiff had to repair and replace the said cables. In such circumstances, the plaintiff had suffered damages and severe losses. The defendant contended that they had carried out the works in accordance with the representations made by the plaintiff's representative regarding the position of the underground 33kv electric cables. The agreed issues, inter alia, were whether the 33kv cables had been damaged as a result of the defendant's negligence. If the answer was in the affirmative, whether the defendant was liable to pay damages to the plaintiff namely, special, aggravated and exemplary damages.

Held, dismissing the plaintiff's claim with costs and cost to be taxed:

(1) There was a relationship of proximity between the plaintiff and the defendant and therefore it was fair and reasonable that the defendant owed a duty of care to the plaintiff. The defendant had to ensure that the plaintiff's 33kv cables were not damaged during the construction and excavation works undertaken by the defendant (see para 13).

(2) The damage to the 33kv cables occurred as a result of the plaintiff's confirmation to the defendant that the 33kv cables were located at a depth of 1.7 meters and protected by concrete slabs. It could not have been within the defendant's knowledge and contemplation that the 33kv cables would be located at a depth of 1.2 meters and without the protection of the concrete slabs. What had occurred was entirely beyond

the defendant's expectation and could not possibly foresee it. Therefore, the damage suffered by the plaintiff was not reasonably foreseeable by the defendant. The defendant had at all times acted in accordance with the standard of care that could be expected from the defendant as a contractor to do the excavation work (see paras 33–35).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk ganti rugi dan kerugian yang disebabkan oleh kemungkiran defendan terhadap kewajipan untuk tort kecuaian. Defendan adalah kontraktor yang dilantik oleh Dewan Bandaraya Kuala Lumpur ('DBKL') untuk menjalankan kerja-kerja pembinaan, antara lain, di PPU Plaza Phoenix bersebelahan stesyen minyak ('lokasi tersebut'). Semasa kerja-kerja pembinaan tersebut, defendan telah merosakkan kabel elektrik 33kv bawah tanah yang dimiliki oleh plaintif. Akibat daripada kerosakan tersebut, ia menyebabkan gangguan bekalan di sekitar Cheras. Plaintif terpaksa membaiki dan menggantikan kabel tersebut. Dalam keadaan sedemikian, plaintif mengalami ganti rugi dan kerugian yang besar. Defendan berhujah bahawa mereka telah menjalankan kerja-kerja mengikut representasi yang dibuat oleh wakil plaintif berkenaan kedudukan kabel elektrik 33kv bawah tanah tersebut. Isu-isu yang dipersetujui, antara lain, adalah sama ada kabel 33kv telah rosak akibat daripada kecuaian defendan. Jika jawapan adalah afirmatif, sama ada defendan bertanggungjawab untuk membayar ganti rugi kepada plaintif iaitu, ganti rugi khas, keterlaluan dan teladan.

Diputuskan, menolak tuntutan plaintif dengan kos dan kos untuk ditetapkan:

(1) Terdapat hubungan rapat di antara plaintif dan defendan dan oleh itu adalah adil dan munasabah bahawa defendan bertanggungjawab untuk kewajipan berhati-hati kepada plaintif. Defendan mesti memastikan yang kabel 33kv plaintif tidak rosak semasa kerja-kerja pembinaan dan penggalian dijalankan oleh defendan (lihat perenggan 13).

(2) Kerosakan kepada kabel 33 berlaku akibat pengesahan plaintif kepada defendan yang kabel 33kv terletak pada kedalaman 1.7 meter dan dilindungi oleh papak konkrit. Ia tidak mungkin dalam pengetahuan dan fikiran defendan bahawa kabel 33kv akan terletak pada kedalaman 1.2 meter dan tanpa perlindungan papak konkrit. Apa yang telah berlaku adalah betul-betul di luar jangkaan defendan dan tidak mungkin menjangkakannya. Oleh itu, kerugian yang dialami oleh plaintif bukan dijangka oleh defendan. Defendan pada kesemua masa bertindak mengikut standard berhati-hati yang dijangka daripada defendan sebagai kontraktor untuk membuat kerja penggalian (lihat perenggan 33–35).]

Notes

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1157–1226.

Cases referred to

Caparo Industries PLC v Dickman [1990] 2 AC 605, HL (refd)
Majlis Perbandaran Ampang Jaya v Steven Phua Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)

Rozainah Juisin (Shahrizat Rashid & Lee) for the first plaintiff.
Lam Jia Chuen (Chrissie Lim Wen Hsin with him) (Lee Hishammuddin Allen & Gledhill) for the first defendant.

Rosilah Yop JC:

BRIEF FACTS

[1] In this action, the plaintiff claims against the defendant for damages and losses caused by the defendant's breach of duty for the tort of negligence. The defendant was the contractor appointed by Dewan Bandaraya Kuala Lumpur ('DBKL') to carry out the construction works, inter alia, at PPU Plaza Phoenix adjacent to the Petrol Service Station, Taman Len Sen ('the said location'). During the said construction, the defendant had damaged the underground 33kv electric cables. The plaintiff was the owner of the said 33kv electric cables.

[2] It is not disputed that the defendant had caused the damage to the plaintiff's 33kv electric cables at the said location. As a result of the damage had affected the supply disruption in Cheras area. The plaintiff had to repair and replaced the said cables. In such circumstances the plaintiff has suffered damages and severe losses.

[3] The defendant contends that they had carried out the works in accordance with the representations made by the plaintiff's representative regarding the position of the underground 33kv electric cables.

THE ISSUES

[4] The agreed issues are summarised, inter alia, whether the 33kv cables had been damaged as a result of the defendant's negligence. If the court finds that the defendant was negligent, then the court has to determine whether the defendant is liable to pay to the plaintiff for the special damages amounting to RM1,407,337.50, aggravated and exemplary damages.

[5] My decision is based on the issues that have been agreed by both parties.

THE FINDINGS OF THE COURT

[6] The plaintiff's claim against the defendant is based on the tort of negligence.

[7] The Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phua Cheng Loon & Ors* [2006] 2 MLJ 389 at p; [2006] 2 CLJ 1 at pp 17–18, confirmed the general duty of care test that was enunciated in *Caparo Industries PLC v Dickman* [1990] 2 AC 605 and held that in all negligent claims for economic loss, the three elements that need to be satisfied were:

(a) whether the damage suffered by the plaintiff is reasonably foreseeable;

(b) whether there is a relationship of proximity between the plaintiff and the defendant; and

(c) whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care.

[8] The plaintiff contends that the defendant owes a duty do care to the plaintiff and the defendant had breached its duty of care. The breach had caused damage to the plaintiff.

[9] Whereas the defendant contends that they do not owe any duty of care to the plaintiff or in the alternative if the court finds that there was a duty of care owed to the defendant, the defendant had not breach such duty.

[10] It is undisputed that before the defendant commenced the work at the said location, there were site meetings held between the plaintiffs and the defendant's representatives together with representatives from the project consultant and other utility companies and authorities.

[11] The purpose of the meetings was to enable the parties to discuss the respective party's fixtures or properties that were located at the said location where the defendant's works were carried out.

[12] SD1 in his evidence confirmed that since the defendant's work was done at the place where the plaintiff's cables were located and would affect the plaintiff's cables. Therefore the defendant has to ensure that the plaintiff's cables are not damaged.

[13] Based on the above reasons, I hold that there was a relationship of proximity between the plaintiff and the defendant and therefore it is fair and reasonable that the defendant owe a duty of care to the plaintiff. The defendant has to ensure that the plaintiff's 33kv cables were not damaged during the construction and excavation works which were being undertaken by the defendant.

[14] The question for the court to decide now is whether the damage

suffered by the plaintiff is reasonably foreseeable by the defendant? Whether the defendant had breached its duty of care to the plaintiff? A

[15] It is settled law that a defendant would only be found to have breached his duty of care to the plaintiff if his conduct has fallen below the standard of care that would have been exercised by a reasonable man in the same circumstances. B

[16] It was not dispute that the damage to the 33kv cables was caused by the defendant during the excavation works. C

[17] The defendant pleaded defence stated as follows:

> 6.3. Pada masa material, sub kontraktor Defendan hanya menjalankan dan melakukan kerja-kerja pengorekan dan / atau penggalian pada kedalaman lebih kurang 1.0 - 1.2 meter sahaja dan bukan pada kedalaman 1.7 meter; D
>
> 6.4. Kabel Elektrik tersebut juga tidak dilindungi oleh sebarang lapisan konkrit seperti yang direpresentasi oleh wakil Plaintif dalam mesyuarat-mesyuarat tapak;
>
> 6.5. Perkara yang dinyatakan dalam perenggan 6.4 di atas, juga telah dilaporkan oleh perunding Projek tersebut yang bertanggungjawab untuk mengawasi kerja-kerja Defendan. Perunding Projek tersebut adalah Tetuan SMHB Sdn. Bhd. ('SMHB'). E

[18] The undisputed evidence of PW2 shows that the defendant had carried out the piloting work prior to the excavation. This means that the defendant had already taken the precautionary measures to ascertain the location and depth of the 33kv cables prior to the excavation. The plaintiff was also present when the defendant conducted the piloting work. PW2 who was the plaintiff's engineer, confirmed that he attended the piloting done by the defendant. F G

[19] The plaintiff's representative had expressly confirmed at the Site Meeting No 15, 16 and 17 that 33kv cables were at the depth of 1.7 meters and protected by concrete slabs. H

[20] The evidence from Minutes of Site Meeting No 15 dated 21 September 2006 (bundle B p 22) stated:

> 2.1.4. Existing 33kv (6 ways) at Petronas Service Station Taman Len Sen.
>
> … The cables appeared deep (1.7m) and well protected with concrete. I

[21] Minutes of Site Meeting No 16 dated 30 October 2006 (bundle B p 29) stated:

2.1.4. Existing 33kv (6 ways) at Petronas Service Station Taman Len Sen.

… The cables appeared deep (1.7m) and well protected with slab.

[22] Minutes of Site Meeting No 17 dated 23 November 2006 (bundle B p 63) stated:

2.1.4. Existing 33kv (6 ways) at Petronas Service Station Taman Len Sen

… Existing 33kv (6 ways) cables appeared deep (1.7m) and well protected with slab

[23] All these evidence were not challenged by the plaintiff. Infect all the facts above were given by the plaintiff itself.

[24] The testimony of PW1 corroborates PW2's testimony that the defendant was aware that the plaintiff's own technical specifications require the 33kv cables to be protected by concrete slabs.

[25] PW1 and PW2 testified that the significance and purpose of the concrete slabs were to protect the cables and to alert any party doing the excavation works in the said area to the existence of the 33kv cables.

[26] Contrary to the evidence given by the defendant, the 33kv cables were actually found at a depth of 1.2 meters and were not protected by concrete slabs.

[27] DW3, the resident engineer of the project at that time testify that the 33kv cables was at a depth of 1–1.2 meters at the time of the incident and were not protected by any concrete slabs.

[28] DW3's evidence was supported by his report which he prepared only one day after the incident. He prepared this report, D19 for the head quarters of SMHB. The contents of D19 were not challenged by the plaintiff.

[29] Further PW1 and PW2 evidence confirmed that the 33kv cables were not protected by concrete slabs.

[30] From the undisputed documentary and oral evidence the defendant and plaintiff had jointly physically ascertained that the 33kv cables were at a depth of 1.7 meters and protected by concrete slabs.

[31] The plaintiff, in their site meeting had confirmed that the 33kv cables in

the said area were located at a depth of 1.7 meters and were protected by concrete slabs. The defendant had only excavated up to a depth of 1.2 meters when the incident occurred.

[32] Based on the above, I find that the 33kv cables were located at the excavation depth of 1.2 meters and no concrete slab protecting the 33kv cables and more importantly not providing a warning of the presence of the 33kv cables.

[33] The damage to the 33kv cables occurred as a result of the plaintiff's confirmation to the defendant that the 33kv cables were located at a depth of 1.7 meters and protected by concrete slabs.

[34] In the light of this evidence, I find that it could not have been within the defendant's knowledge and contemplation that the 33kv cables would be located at a depth of 1.2 meters and without the protection of the concrete slabs. What had occurred on 3 December 2007 was entirely beyond the defendant's expectation and could not possibly foresee it. Therefore I find that the damage suffered by the plaintiff is not reasonably foreseeable by the defendant.

[35] Based on all the evidence adduced, I find that the defendant had at all times acted in accordance with the standard of care that could be expected from the defendant as a contractor to do the excavation work.

[36] Thus, the defendant has not breached its duty of care to the plaintiff.

[37] The plaintiff has failed to make out a case of negligence against the defendant.

[38] I therefore dismissed the plaintiff's claim with cost and cost to be taxed.

Plaintiff's claim dismissed with costs and cost to be taxed.

Reported by Ashgar Ali Ali Mohamed